

# SUPREME COURT OF THE UNITED STATES

MICHAEL TERRELL *v.* TERRY L. MORRIS,  
SUPERINTENDENT, SOUTHERN OHIO  
CORRECTIONAL FACILITY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 88-7535. Decided October 10, 1989

## PER CURIAM.

Petitioner Terrell is incarcerated in a state prison in Ohio. After applying for state-law postconviction relief, he petitioned for a federal writ of habeas corpus pursuant to 28 U. S. C. § 2254.

Terrell's habeas petition includes an ineffective assistance of counsel claim. The Ohio courts held in postconviction proceedings that Terrell had defaulted this claim by failing to raise it when represented by new counsel on direct appeal. In so doing, the Ohio courts relied upon *State v. Cole*, 2 Ohio St. 3d 112, 113-114, 443 N. E. 2d 169, 171 (1982). The *Cole* rule postdated Terrell's appeal, which was decided December 30, 1981. Before *Cole*, Ohio had permitted ineffective assistance claims in collateral challenges even if a petitioner had not raised those claims when represented by new counsel on direct appeal. See *State v. Hester*, 45 Ohio St. 2d 71, 71-72, 74-75, 341 N. E. 2d 304, 305, 307 (1976) (permitting a post-conviction ineffective assistance claim to go forward despite a failure to raise the issue on direct appeal); see also *Cole*, 2 Ohio St. 3d, at 113-114, 443 N. E. 2d, at 171 (expressly modifying *Hester*).

Terrell thus could not have known that he would default his ineffective assistance claim by his new counsel's failure to raise it on direct appeal. Terrell argued to the Federal District Court that the State could not invoke its procedural default rule retroactively. The District Judge agreed, and proceeded to the merits of Terrell's ineffective assistance claim.

The Sixth Circuit disposed of Terrell's pro se appeal in a *per curiam*, unpublished opinion. *Terrell v. Marshall*, 872 F. 2d 1029 (1989) (judgment order). The Court of Appeals held that "the District Court properly determined that Terrell's" ineffective assistance claim, as well as several other claims, "were not reviewable" because of Terrell's "failure to raise these claims in state court proceedings." App. A to Pet. for Cert. 2. The District Court had, however, made no such determination: the District Court reached the merits of the ineffective assistance claim because the only applicable procedural default rule postdated Terrell's conviction. The Court of Appeals neither noted nor addressed the retroactivity issue.\*

The Sixth Circuit, by its unpublished opinion, affirmed a decision that the District Court never made, and so never reviewed that court's actual decision. Review of the procedural bar and retroactivity issues should be undertaken based on a correct formulation of the ruling in the District Court. Accordingly, the motion for leave to proceed *in forma pauperis* and the petition for certiorari are granted. The judgment of the Court of Appeals is vacated, and the case is remanded to that Court for further proceedings consistent with this opinion.

*It is so ordered.*

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\*The author of the Court of Appeals' unpublished opinion may have relied on the Magistrate's conclusion that petitioner's ineffective assistance of counsel claim was barred by procedural default. See App. C to Pet. for Cert. 4. The Magistrate, however, had neither noted nor addressed the retroactivity issue that the District Court resolved in petitioner's favor. Because the question whether the Ohio Supreme Court's decision in *State v. Cole* should be given retroactive effect may govern the disposition of a significant number of ineffective assistance of counsel claims, the question clearly merits the attention of the Court of Appeals. Moreover, since the answer to the question requires a familiarity with Ohio law, it should not be addressed in this Court before we have the benefit of the Court of Appeals' views.